ATTORNEY FOR APPELLANT:

ELIZABETH B. SEARLE
Ball Eggleston PC
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General Of Indiana

ANN L. GOODWIN
Special Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JASON A. PERRY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A04-0704-CR-233
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No.79C01-0601-FA-1

May 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Jason Perry was convicted of burglary, a Class B felony; criminal deviate conduct, a Class B felony; sexual battery, a Class D felony; and attempted rape, a Class B felony. Perry then pled guilty to eight other offenses, and the trial court sentenced him to an aggregate sentence of 223 years. On appeal, Perry challenges some of his convictions and his sentence, raising five issues for our review:

> 1. whether there was sufficient evidence to disprove that Perry abandoned attempted rape;
> 2. whether Perry's convictions of attempted rape, criminal deviate conduct, and sexual battery violated the prohibition against double jeopardy;
> 3. whether the trial court properly responded to a question from the jury after deliberations had begun;
> 4. whether the trial court properly sentenced Perry; and
> 5. whether Perry's sentence is inappropriate in light of the nature of the offenses and his character.

We affirm, concluding that sufficient evidence disproves Perry's abandonment defense, that Perry's convictions did not violate the prohibition against double jeopardy, that the trial court's response to the jury question does not constitute fundamental error, that the trial court properly sentenced Perry, and that Perry's sentence is not inappropriate in light of the nature of the offenses and his character.

Facts and Procedural History

The facts relating to Perry's convictions involve three victims – J.J., A.H., and M.P. – and three separate occasions. We will discuss the facts relating to each of these victims in turn, but pause here to note that the facts relating to the offenses against A.H. and M.P. are less detailed because Perry pled guilty to those offenses.

In the early morning hours of June 12, 2003, J.J. awoke to find Perry standing over her with his latex-gloved hand covering her mouth and telling her not to make a sound. Perry moved his hand from J.J.'s mouth to her throat and began rubbing her stomach and side. Perry then removed J.J.'s underwear, undid his belt, and unzipped his pants. Perry again told J.J. not to make a sound, but this time threatened to hurt her if she did. At this point, Perry was leaning against J.J., with his hips positioned slightly above her hips, and she could feel his semi-erect penis pressing against her inner thigh. As he leaned against her, Perry licked J.J.'s breast and penetrated her vagina with his finger, causing her to flinch. At some point during the penetration or before (the record is unclear on this point), J.J. told Perry that she never had sexual intercourse and that she might involuntarily make noise. Perry expressed disbelief, then removed his finger from her vagina, started to walk away, and told J.J. he would be back for her. Concerned that Perry might find her roommate, J.J. grabbed Perry's arm, told him she had a roommate, and asked him not to hurt her. Perry told J.J. he "was not going to bother anyone else," but told her again that he would be back for her and added that he would be watching her. Transcript at 57. Perry left shortly thereafter and did not return.

On July 30, 2003, Perry broke into A.H.'s residence through a window and, while armed with a box cutter, bound A.H.'s hands with a rope, told her he would kill her if she screamed, and attempted to rob her. Perry then moved A.H. into her bedroom, penetrated her anus with his finger and with his penis, and raped her.

On August 13, 2003, Perry entered into M.P.'s residence through an open window and, while armed with a screwdriver, bound M.P.'s hands with a rope and attempted to rob her.

In August and September 2003, the State charged Perry with twenty offenses related to the events described above:[1]

Offense	Victim	Offense Level
Burglary	J.J.	Class B Felony
Criminal Deviate Conduct	J.J.	Class A Felony
Sexual Battery	J.J.	Class C Felony
Attempted Rape	J.J.	Class A Felony
Criminal Confinement	J.J.	Class D Felony
Burglary	A.H.	Class A Felony
Criminal Confinement	A.H.	Class B Felony
Criminal Confinement	A.H.	Class B Felony
Criminal Confinement	A.H.	Class B Felony
Intimidation	A.H.	Class C Felony
Criminal Deviate Conduct	A.H.	Class A Felony
Criminal Deviate Conduct	A.H.	Class A Felony
Rape	A.H.	Class A Felony
Attempted Robbery	A.H.	Class B Felony
Burglary	M.P.	Class A Felony
Criminal Confinement	M.P.	Class B Felony
Criminal Confinement	M.P.	Class B Felony
Intimidation	M.P.	Class C Felony
Attempted Robbery	M.P.	Class B Felony
Intimidation	M.P.	Class D Felony

See Appellant's Second Supplemental Appendix at 764-68, 770-83; Appellee's Brief at 2-3. Perry's trial in June 2004 resulted in convictions on all twenty charges, but this

[1] The State also charged Perry with three other offenses unrelated to the incidents involving J.J., A.H., and M.P., but they are not relevant to this appeal.

court reversed because the trial court improperly tried the charges involving J.J. together with the charges involving A.H. and M.P. Perry v. State, No. 79A02-0408-CR-660, slip op. at 7-11 (Ind. Ct. App., Oct. 31, 2005), trans. denied.

Perry's second trial in December 2006 was limited to the charges involving J.J. The jury returned guilty verdicts on all five charges, but found that Perry did not commit burglary, attempted rape, criminal deviate conduct, and sexual battery while using or threatening the use of deadly force, thus reducing those offenses to one felony level lower than the level at which they were initially charged. The trial court entered judgments of conviction on these four verdicts, but declined to enter judgment on the criminal confinement verdict. Perry then entered into a plea agreement under which he agreed to plead guilty to six charges involving A.H. and two charges involving M.P. In exchange for Perry's guilty plea, the State agreed to dismiss the remaining seven charges.

The trial court took Perry's guilty plea under advisement and scheduled a sentencing hearing for January 9, 2007. At the sentencing hearing, the trial court accepted Perry's guilty plea. After hearing evidence and argument from counsel on sentencing, the trial court entered an order finding that Perry's guilty plea was a mitigating circumstance and that Perry's history of illegal drug and alcohol abuse, criminal history, commission of the offenses while on probation, and the victims' recommendation of aggravation were aggravating circumstances. The trial court also found that the aggravating circumstances outweighed the mitigating circumstance. Based on these findings, the trial court sentenced Perry to an aggregate term of 223 years, which consisted of the following:

Offense	Victim	Offense Level	Sentence (Years)
Burglary	J.J.	Class B Felony	16
Criminal Deviate Conduct	J.J.	Class B Felony	16
Sexual Battery	J.J.	Class D Felony	2
Attempted Rape	J.J.	Class B Felony	16
Burglary	A.H.	Class A Felony	40
Confinement	A.H.	Class D Felony	2
Criminal Deviate Conduct	A.H.	Class B Felony	15
Criminal Deviate Conduct	A.H.	Class B Felony	15
Rape	A.H.	Class A Felony	40
Attempted Robbery	A.H.	Class C Felony[2]	6
Burglary	M.P.	Class A Felony	40
Attempted Robbery	M.P.	Class B Felony	15

See Appellant's Second Supp. App. at 123; Appellee's Br. at 4. Perry now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

Perry argues there was insufficient evidence to disprove that he abandoned the attempted rape of J.J. This court reviews a challenge to sufficiency of the evidence to disprove an abandonment defense under the same standard as any challenge to the sufficiency of the evidence. See Gravens v. State, 836 N.E.2d 490, 497 (Ind. Ct. App. 2005), trans. denied. That is, the verdict will not be disturbed if there is substantial evidence of probative value to support it. Id. In making this determination, we look only

[2] The trial court entered its judgment of conviction on this offense as a Class C felony, as indicated by one portion of the sentencing order and the abstract of judgment. See Appellant's Second Supp. App. at 129 (sentencing order); id. at 123 (abstract of judgment). However, another portion of the sentencing order states Perry pled guilty to the offense as a Class B felony, see id. at 126, which is consistent with the level at which the State charged the offense, see id. at 778, and Perry's admission that he used a box cutter while committing the offense, see tr. at 303; Ind. Code § 35-42-5-1 (stating that robbery is elevated to a Class B felony if it is committed while armed with a deadly weapon). Regardless, because the State does not contest the trial court's apparent lowering of this offense to a Class C felony, we will assume for purposes of this opinion that the trial court's classification of the offense as such was proper.

to the probative evidence and reasonable inferences supporting the verdict and neither reweigh evidence nor judge witness credibility. Id.

Abandonment is a legal defense to inchoate crimes such as attempted rape. Ind. Code § 35-41-3-10; Smith v. State, 636 N.E.2d 124, 127 (Ind. 1994). "Where attempt is at issue, an accused will be relieved of criminal responsibility if, subsequent to taking a substantial step towards committing a crime but prior to its consummation, he voluntarily abandoned his efforts." Smith, 636 N.E.2d at 127. Abandonment is considered voluntary if the decision to do so originates with the accused and is not "the product of extrinsic factors that increase the probability of detection or make more difficult the accomplishment of the criminal purpose." Id. Thus, to disprove Perry's abandonment defense, the State was required to present evidence from which the jury could have concluded beyond a reasonable doubt that the abandonment was not voluntary.

J.J. testified that she told Perry she never had sexual intercourse and that the reasons she did so were to deter him and to inform him that she might involuntarily make noise. See Tr. at 71 ("Q[:] Okay. Why did you tell him that you were a virgin? A[:] Both of the reasons that were previously mentioned, one that I was hoping that it would, if there was something left that that would deter him but also as a warning that if I made noise it was not intentional."). Perry acknowledges that J.J. told him she never had sexual intercourse, but argues this evidence is insufficient to disprove that his abandonment was voluntary because she did not share these reasons with him. See Appellant's Reply Brief at 11 ("J.J. did not share her reasons for making her statement with Perry. She did not tell Perry that she was afraid that she would make noise. There

is no evidence that Perry had experience with virgins and knew whether or not virgins might make noise. Rather, the only evidence is something in J.J.'s mind, not shared with Perry." (Emphases in original)). Perry's argument disregards our standard of review, which requires that we not only look to the probative evidence supporting the verdict, but also to the reasonable inferences drawn from such evidence. Gravens, 836 N.E.2d at 497. One such reasonable inference is that because Perry left J.J.'s bedroom shortly after J.J. told him she never had sexual intercourse, Perry had this warning in mind when he decided to abandon his attack. Moreover, as the State points out, because it is reasonable to infer that by involuntarily making noise J.J. "might make the accomplishment of the rape more difficult or increase the chances that [Perry] might be caught . . . ," appellee's br. at 29, it follows that there was sufficient evidence to disprove that Perry's abandonment was voluntary.

II. Response to Jury Question

Perry argues the trial court improperly responded to a question from the jury after deliberations had begun. Instructing the jury lies within the trial court's discretion, and its decision will not be considered an abuse of discretion unless the instruction misstates the law or otherwise misleads the jury. State v. Snyder, 732 N.E.2d 1240, 1244 (Ind. Ct. App. 2000). Even where an abuse of discretion has occurred, to receive a new trial, the defendant must also show the abuse prejudiced his substantial rights. Gantt v. State, 825 N.E.2d 874, 877 (Ind. Ct. App. 2005).

Before addressing Perry's argument, some background is in order. After deliberating for approximately six hours, the trial court called the jury back into the

courtroom to determine the status of deliberations. The foreperson responded that they had reached unanimous verdicts on four of the charges, but were not "reasonably close" on the attempted rape charge. Tr. at 238. The trial court told the jury to deliberate further, but explained they could "present a question to the court or some request" if they so desired. Id. at 239. In response, the jury submitted three questions. The first and second questions sought clarification on the instructions pertaining to the defense of abandonment and the substantial step element of attempted rape, respectively, and the third requested a rehearing of J.J.'s testimony. The second question is the relevant one here, it stated, "Do we have to interpret number two as written or not?" Id. at 241. "Number two" refers to the second element of attempted rape; the instruction stated that the jury could conclude the State had proved the substantial step element of attempted rape if it found beyond a reasonable doubt that Perry "did remove [J.J.'s] underwear and rubbed his penis against her leg or did attempt to penetrate her vagina with his penis."[3] Appellant's Appendix at 25.

The manner in which the trial court and the parties' counsel attempted to formulate responses to these questions, particularly the second one, is somewhat confusing. Initially, the trial court apparently agreed with Perry's counsel that the appropriate response to the second question was that the jury had to interpret the instruction as written. See Tr. at 242-43 (trial court, in response to Perry's counsel's arguments that the jury "must interpret [the instruction] as written" and that the

[3] This language mirrored the charging information, which alleged that Perry committed the substantial step element "by removing [J.J.'s] underwear and by rubbing his penis against her leg or attempting to penetrate her vagina with his penis . . . ." Appellant's Second Supp. App. at 767.

prosecuting attorney's position that the substantial step element could be established based on a variety of conduct "is the absolute wrong interpretation of the law," stating, "I believe so too."). Shortly thereafter, the trial court adjourned for the day. The following day, however, the trial court stated, "my recollection is that we had this discussion late yesterday evening and I ruled at that time that we were not going to do anything further about [the second question] . . . ."[4] Id. at 255. Instead, the trial court explained that it was going to respond to the first question by allowing counsel for both parties five minutes of further argument on the law of abandonment and to respond to the third question by allowing the jury to listen to an audio recording of J.J.'s testimony. Perry's counsel's remarks indicate that he did not oppose this ruling. See id. at 256 (Perry's counsel stating "Right I understand," "Right," and "Okay," in response to trial court's statements indicating that it was going to respond to only the first and third questions).

Perry argues that the trial court abused its discretion by refusing to respond to the second question because Indiana Code section 34-36-1-6 required a response. However, Perry has waived this argument because he failed to object to the trial court's proposed response. As indicated above, although the trial court initially appeared to endorse Perry's counsel's position regarding the second question, the trial court ultimately concluded it was not going to respond. Perry's counsel did not object to this ruling; instead, he stated, "Right I understand," "Right," and "Okay," as the trial court explained its proposed responses to the first and third questions. Id. Perry cannot assign error to a

[4] The transcript attributes this statement to the prosecuting attorney. We assume this is error, but even if it is not, other statements make clear that the trial court ruled it was not going to address the second question.

response his counsel tacitly endorsed or, at a minimum, failed to object to. Cf. Perry v. State, 867 N.E.2d 638, 643 (Ind. Ct. App. 2007) (concluding the trial court did not abuse its discretion in responding to several jury questions where the parties stipulated to the trial court's responses), trans. denied.

Perry attempts to avoid the effect of waiver by arguing that the trial court's refusal to respond to the second question constituted fundamental error. Perry argues the error was fundamental because by ignoring the second question and responding to the first one, the trial court implicitly acknowledged the State had proved the substantial step element of attempted rape. We agree with Perry that the trial court's response was erroneous. "Trial courts are required to respond to jury inquiries 'as to any point of law arising in the case.'" Tincher v. Davidson, 762 N.E.2d 1221, 1224 (Ind. 2002) (quoting Indiana Code § 34-36-1-6). The jury's second question – "Do we have to interpret number two as written or not?" – sought clarification on how to interpret the trial court's instruction on the substantial step element of attempted rape and therefore constituted a "point of law arising in the case" within the meaning of Indiana Code section 34-36-1-6. Cf. Powell v. State, 769 N.E.2d 1128, 1133 (Ind. 2002) (noting that "[t]here is no dispute that the jury's question in this case concerned a point of law" where the jury submitted a question seeking clarification of an instruction).

However, we part ways with Perry to the extent he argues the trial court's error was fundamental. "To constitute fundamental error, the error must be a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process." Weis v. State, 825 N.E.2d 896,

902 (Ind. Ct. App. 2005). While responding to the first question from the jury, Perry's counsel discussed the defense of abandonment in conjunction with the State's burden of proof on the substantial step element of attempted rape:

> It's a two point process. First you must find that in an attempt he committed the substantial step toward it. If you don't find that he committed this substantial step as specifically alleged by the [S]tate your analysis is over. Not guilty because they haven't proven it. But first he must commit this substantial step. . . . This case, the [S]tate specifically allege[d] in [the attempted rape instruction] that Jason pulled down her underwear and rubbed his penis against her. If you find that – if you're convinced beyond a reasonable doubt that that substantial step occurred because that's what the [S]tate allege[d], that's what they must prove, nothing else. Whether the penis rubbed against her if you're not convinced beyond a reasonable doubt your analysis is over it's not guilty on the attempted rape because there was not substantial step.

Tr. at 271-72. Because these observations sufficiently informed the jury as to the State's burden of proof regarding the substantial step element of attempted rape, we are not convinced that the trial court's error in not responding to the second question rises to the level of fundamental error.

III. Double Jeopardy

Perry argues that his convictions of attempted rape, criminal deviate conduct, and sexual battery violate the Indiana constitutional prohibition against double jeopardy. "[T]wo or more offenses are the 'same offense' in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999) (emphasis in original). Perry limits his argument

to a violation of the actual evidence test. To prevail under that test, "the defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense." Id. at 53. In making this determination, a reviewing court may consider the charging information, arguments of counsel, and final jury instructions. McIntire v. State, 717 N.E.2d 96, 100 (Ind. 1999).

To convict Perry of attempted rape as a Class B felony, the State was required to prove beyond a reasonable doubt that Perry intentionally took a substantial step toward having sexual intercourse while compelling J.J. to do so by force or threat of force. See Ind. Code §§ 35-41-5-1 and 35-42-4-1. To convict Perry of criminal deviate conduct as a Class B felony, the State was required to prove beyond a reasonable doubt that Perry knowingly or intentionally performed deviate sexual conduct[5] on J.J. while compelling her to do so by force or imminent threat of force. See Ind. Code § 35-42-4-2. To convict Perry of sexual battery as a Class D felony, the State was required to prove beyond a reasonable doubt that Perry touched J.J. intending to arouse his or J.J.'s sexual desires while compelling her to submit to the touching by force or the imminent threat of force. See Ind. Code § 35-42-4-8.

The charging informations for these offenses, which were included as a single jury instruction, state that Perry committed the substantial step of attempted rape when he either rubbed his penis against J.J.'s leg or when he attempted to penetrate her vagina

[5] Indiana Code section 35-41-1-9 defines "deviate sexual conduct" as "an act involving . . . a sex organ of one person and the mouth or anus of another person . . . or . . . the penetration of the sex organ or anus of a person by an object.

with his penis; that Perry committed the act of criminal deviate conduct when he penetrated J.J.'s vagina with his finger; and that Perry committed the act of sexual battery when he either fondled J.J.'s body or when he kissed her breast. The separate instruction on attempted rape mirrors the charging information, but the separate instructions on criminal deviate conduct and sexual battery omit the specific acts alleged in the charging informations and simply track the language of the respective statutes. See Appellant's App. at 23 (stating that Perry committed the act of criminal deviate conduct when he "[c]aused [J.J.] to perform or submit to deviate sexual conduct"); id. at 24 (stating that Perry committed the act of sexual battery when he "[t]ouched [J.J.]").

Perry argues that his convictions for these offenses placed him in double jeopardy because there is a reasonable possibility the jury used the same act to convict him of all three, or at least two, of the offenses. Before addressing this argument, we note initially that by framing his double jeopardy violation as such, Perry is arguing merely that there is a reasonable possibility the jury used the same evidentiary facts to establish one element of an offense and one element of either or both of the remaining two offenses. As our supreme court explained in Spivey v State, 761 N.E.2d 831, 833 (Ind. 2002), such an argument, even if sustained, does not violate the Richardson actual evidence test because, under that test, "the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense." However, our supreme court has acknowledged several common law rules that also can serve as a basis for a double jeopardy violation. Because one of these common law rules is consistent

with Perry's argument, see Guyton v. State, 771 N.E.2d 1141, 1143 (Ind. 2002) (stating that the double jeopardy clause also prohibits "[c]onviction and punishment for a crime which consists of the very same act as an element of another crime for which the defendant has been convicted and punished" (quoting Richardson, 717 N.E.2d at 56 (Sullivan, J., concurring))), we will examine the argument in that context.

As noted above, the charging informations and the instruction containing the language of the charging informations specified a separate act for each offense. The prosecuting attorney took a similar approach during her closing argument. First, she emphasized that the act supporting criminal deviate conduct was Perry penetrating J.J.'s vagina with his finger: "And we know by definition that deviant sexual conduct includes the act of penetration of the [vagina] by any object and that object includes a finger." Tr. at 204. Next, she argued that the act of sexual battery was established when Perry "touched [J.J.] by licking her breast" and asked "why else do you go into somebody else's house, take off their [sic] underwear and lick there [sic] breast other then [sic] for a sexual desire[?]" Id. at 205. Finally, the prosecuting attorney argued that the following acts supported attempted rape:

> He had already removed her underwear, he had already put his finger in her [vagina], his belt buckle had already come undone. His zipper had already come down and he lowered his hands. He was pressing up against her, and she could feel his partially erected penis right near her [vagina] pressing up against [her] buttocks.

Id. at 206. For his part, Perry's counsel reiterated some of the points made by the prosecuting attorney, stating that "the only element they are relying on to support the substantial [step] toward rape" is that Perry "removed her underwear and rubbed his

penis against her leg," id. at 216, and that "[t]he touching of the breast [is] the conduct they rely on on the sexual battery and holding her down," id. at 219. We also note that during her rebuttal, the prosecuting attorney strayed when she suggested the act of attempted rape was when Perry inserted his finger into J.J.'s vagina, but this suggestion was accompanied by other conduct: "He crawls onto her bed takes her underwear off, puts his finger into her [vagina], unbuckles his pants, unzips his pants, removes his pants and while his hands are other wise occupied it his [sic] hip region that is pressed up against her buttocks and her vaginal area." Id. at 231. Thus, although there is, to use the State's term, "some overlap," appellee's br. at 26, among the evidentiary facts used to support the act elements of attempted rape, criminal deviate conduct, and sexual battery, our review of the charging informations, jury instructions, and arguments of counsel convinces us that such facts were sufficiently separated among the offenses so as to avoid any double jeopardy concerns.

IV. Propriety of Sentence

Perry argues the trial court improperly found two aggravating circumstances, improperly refused to find a mitigating circumstance, and improperly balanced the aggravating and mitigating circumstances in arriving at an aggregate sentence of 223 years. We will address each of these arguments in turn, but note initially that in cases such as this one where the trial court imposes a sentence in excess of the statutory presumptive sentence,[6] it must identify and explain all significant aggravating and

[6] The presumptive sentencing scheme applies in this case because Perry committed his crimes prior to April 25, 2005, the date the advisory sentencing scheme became effective. See Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007).

mitigating circumstances and explain its balancing of the circumstances. Roney v. State, 872 N.E.2d 192, 198 (Ind. Ct. App. 2007), trans. denied. We grant a trial court considerable discretion in imposing sentences and will not conclude the trial court's decision is an abuse of discretion unless it is clearly against the logic and effect of the facts and circumstances before it. Id. Moreover, even if we conclude the trial court abused its discretion, "we have the option to remand to the trial court for a clarification or new sentencing determination, to affirm the sentence if the error is harmless, or to reweigh the proper aggravating and mitigating circumstances independently at the appellate level." Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005).

Perry argues the trial court improperly found that his alcohol abuse was an aggravating circumstance because he reported only sporadic use in the Presentence Investigation Report ("PSI") and has no convictions for alcohol-related crimes. Perry's argument overlooks the trial court found that Perry's "history of illegal drug and alcohol abuse" was an aggravating circumstance, not his history of alcohol abuse alone. Appellant's Second Supp. App. at 127 (emphasis added). In this respect, the PSI states Perry reported that he drank while underage on at least three occasions and that his illegal drug use included marijuana, LSD, PCP, and Ecstasy. Perry further reported that he used marijuana at least once a week between the ages of 17 and 24 and that between the ages of 25 and 26 "it was an everyday thing." Appellant's Supplemental Appendix at 109. Thus, we cannot say the trial court abused its discretion in finding that Perry's history of illegal drug and alcohol abuse was an aggravating circumstance.

Perry argues the trial court improperly refused to find that his remorse was a mitigating circumstance. In making this challenge, Perry acknowledges the trial court considered his statement of remorse at trial, but failed "to acknowledge the remorse [he] felt ever since he confessed to the crime of J.J., and when he volunteered information to the police against A.H. and M.P. that he also committed crimes." Appellant's Br. at 22. However, for the trial court's refusal to have been improper, Perry must establish that the mitigating evidence was significant and clearly supported by the record. McCann v. State, 749 N.E.2d 1116, 1121 (Ind. 2001). In this respect, the record indicates that Perry confessed only after he had been informed that his DNA was recovered from J.J.'s home and, even at that point, he continued to deny various aspects of his crimes, such as that he committed the crimes against A.H. and M.P. while using a box cutter and a screwdriver, respectively. Thus, although the trial court did not address Perry's claim that he expressed remorse in the months after the crimes had been committed, we conclude the trial court did not improperly refuse to find that such remorse was a mitigating circumstance because it is not significant.

Finally, Perry argues the trial court improperly balanced the aggravating and mitigating circumstances in arriving at a sentence. In addition to Perry's history of illegal drug and alcohol abuse, the trial court found that the victims' recommendation of aggravation, Perry's criminal history, and Perry's commission of the offenses while on probation were aggravating circumstances. The latter two aggravators carry great weight because Perry's criminal history includes felony convictions of attempted theft, residential entry, and burglary, and he committed the current offenses while on probation

for the burglary conviction. See Ryle v. State, 842 N.E.2d 320, 323 n.5 (Ind. 2005) ("While a criminal history aggravates a subsequent crime because of recidivism, probation further aggravates a subsequent crime because the defendant was still serving a court-imposed sentence."), cert. denied, 127 S. Ct. 90 (2006); Wooley v. State, 716 N.E.2d 919, 929 n.4 (Ind. 1999) (stating that the significance of a defendant's criminal history "varies based on the gravity, nature and number of prior offenses as they relate to the current offense"). Considering these aggravating circumstances against the sole mitigating circumstance of Perry's guilty plea, we cannot say the trial court abused its discretion in concluding the former outweighed the latter.

V. Appropriateness of Sentence

Although we conclude the trial court properly sentenced Perry, Indiana appellate courts nevertheless have authority to revise a sentence "if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We may "revise sentences when certain broad conditions are satisfied," Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005), and we recognize that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed," Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). In determining whether a sentence is inappropriate, we examine both the nature of the offense and the character of the offender. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When making this examination, we may look to any factors appearing in the record. Roney, 872 N.E.2d at 206. However, "a defendant must persuade the appellate court that

his or her sentence has met this inappropriateness standard of review." Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Perry received an aggregate sentence of 223 years, which is between the presumptive sentence of 157 years and the maximum sentence of 288 years for the crimes of which he was convicted where the sentences for those convictions are imposed consecutively. Regarding the nature of the offenses, Perry's conduct was serial and calculated, as evidenced by the fact that he wore dark clothing, a stocking cap, and latex gloves when he committed at least some of the crimes. Moreover, as the prosecuting attorney noted at sentencing, Perry's offenses exhibited a "plan of escalation" such that by the time he committed the offenses against M.P., Perry's goal was to have M.P. drive him to an ATM machine so he could withdraw money. Thus, the nature of the offenses does not render Perry's sentence inappropriate.

Regarding Perry's character, we note, as the trial court did, that Perry pled guilty to some of the offenses. A guilty plea generally comments favorably on a defendant's character, see Scheckel v. State, 655 N.E.2d 506, 511 (Ind. 1995), but this court has noted an exception "where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one," Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied. The record indicates that Perry received a substantial benefit for his guilty pleas, as the State dismissed seven charges. Against the relatively low mitigating weight of Perry's guilty pleas are indicators in the record that he committed the current offenses while on probation for a prior burglary conviction and that in addition to the burglary conviction,

Perry has felony convictions for attempted theft and residential entry, as well as misdemeanor convictions for battery, battery against a law enforcement officer, and fleeing a law enforcement officer. The prior burglary conviction comments very negatively on Perry's character, and its weight is further aggravated by the fact that he was on probation for the burglary conviction when he committed the current offenses. Thus, Perry's character does not render his sentence inappropriate.

The burden was on Perry to establish that his sentence was inappropriate in light of the nature of the offense and his character. After due consideration of the trial court's decision, we are not convinced Perry has carried his burden. Thus, we conclude Perry's sentence is not inappropriate in light of the nature of the offenses and his character.

Conclusion

We conclude that sufficient evidence disproves Perry's abandonment defense, that Perry's convictions did not place him in double jeopardy, and that the trial court's response to the jury question does not constitute fundamental error. We also conclude that the trial court properly sentenced Perry and that his 223-year sentence is not inappropriate in light of the nature of the offense and his character.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.